

Supreme Court, U. S.
FILED

JAN 17 1978

WILLIAM RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. **77-1019**

LIVESTOCK MARKETERS, INC. and PAULK AND BATTEN
LIVESTOCK COMPANY, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

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The Petitioners, Livestock Marketers, Inc. and Paulk and Batten Livestock Company, Inc., and each of them, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 1, 1977.

OPINION BELOW

The Opinion of the Court of Appeals for the Fifth Circuit appears in the Appendix to this Petition.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on September 1, 1977. A timely Petition for Re-hearing was denied on October 20, 1977, and this Petition for Certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

A Complaint naming Petitioners was filed by the Packers and Stockyards Administration, U.S.D.A., alleging violations of the Packers and Stockyards Act, 1921, as Amended and Supplemented (7 U.S.C. 181 et seq.). Violations of said Act were found as against Livestock Marketers, Inc. As against Paulk and Batten Livestock Company, Inc., a separate and distinct entity, violations were neither alleged nor found. Sanctions were ordered against both Petitioners.

1. Where no wrongdoing was alleged or found as against Petitioner Paulk and Batten Livestock Company, does the application of sanctions against same, in disregard of the corporate entity, constitute a denial of Due Process as guaranteed to Petitioner Paulk and Batten by the Fifth Amendment to the Constitution?

2. Is the Finding against Petitioners of a wilfull violation of the Packers and Stockyards Act unwarranted and unsupported by substantial evidence?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 7: §§ 204, 208, 210(c), 213(a), 221, 312(a), 401 (see Appendix to the Petition).

Code of Federal Regulations, § 9: 201.49, 201.55, 201.71, 201.-72, 201.46(a) (see Appendix to the Petition).

STATEMENT OF THE CASE

(In accordance with revised Rule 21(1) of the United States Supreme Court, the record is not included with this Petition. However, references are made to the Appendix filed with the Appeal to the United States Court of Appeals for the Fifth Circuit (APP. . . .), and to the transcript of the hearing before the Secretary of Agriculture (R. . . .).) Petitioner Livestock Marketers, Inc. is a livestock auction company and is a Georgia Corporation having been chartered in 1963. Petitioner Paulk and Batten Livestock Company, Inc. is a livestock dealer and trucking company and is a Georgia Corporation having been chartered in 1968. The officers of Petitioner Corporations, as recorded on their respective registrations filed with the Secretary of Agriculture, are as follows:

Paulk and Batten Livestock Company, Inc.	Livestock Marketers, Inc.
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Herbert Batten—President	Secretary-Treasurer
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Thurston Paulk—Vice President	Vice President
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Johnny Batten—Secretary-Treasurer	Director
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Marvin Giddens—Director	President
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Each of the above named officers own twenty-five (25%) per cent of the stock of each Corporation. (App. 219-220). On April 22, 1975, a Complaint was filed by the Packers and Stockyards Administration, U.S.D.A. hereinafter Respondent, charging Petitioners with wilfully violating the provisions of the Packers and Stockyards Act 1921, as Amended and Supplemented (7 U.S.C. 181 et seq.), hereinafter the Act, and the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. 201.1 et seq.), hereinafter referred to as the

regulations. (App. 5-13), Specifically, it was alleged that Petitioners had knowingly engaged in short-weighing livestock, and had issued accounts of purchase, and paid sellers therefor on the basis of the false weights.

Petitioners filed their answer on May 16, 1975, denying any wrongdoing which amounted to a violation of the Act or the regulations. (App. 14-19). A hearing was afforded Petitioners before Administrative Law Judge Dorothea A. Baker, a hearing examiner of the U. S. Department of Agriculture, on January 14 and 15, 1976.

The charges against Petitioners resulted from an investigation conducted by agents of Respondent during August of 1974.

On August 14, 1974, Respondent's agents purchased twenty-one (21) hogs at Hawkinsville, Georgia. (App. 28). Fourteen (14) of the twenty-one (21) hogs were to be used in connection with the investigation of Petitioners' operations. (App. 28-29). Seven (7) of the fourteen (14) hogs were to be sold to Livestock Marketers, Inc. the following day, and were placed that night in a dry-lot, without access to food and water. (App. 29). The following morning, Respondent's agents returned to weigh the seven (7) hogs. (App. 32, 39-40). The scale used for this purpose was a 3,000 pound capacity single-animal scale graduated in one pound increments which had been mounted on the bed of a two-ton Dodge truck. (App. 26-27). After weighing the hogs, Respondent's agents carried them to the facilities of Livestock Marketers, Inc. at Douglas, Georgia. (App. 56). Employees of Livestock Marketers, Inc. thereupon weighed the hogs in two separate drafts. (App. 56-57). The variations between the weights as recorded by the Respondent's agents and the weights as recorded by Livestock Marketers, Inc. were as follows: (App. 200).

Respondent		Livestock Marketers	Pound Variation	% Variation
Draft One				
(6 hogs)	1299	1290	9	0.7
Draft Two				
(1 hog)	354	349	9	2.5

Later that day, Respondent's agents returned to Hawkinsville, Georgia, and placed an additional seven (7) hogs in the dry-holding pen for the night. (App. 89). The following morning, the same process was repeated. Seven (7) hogs were weighed on Respondent's scale and carried for sale to Livestock Marketers, Inc. facility. (App. 90-96). Thereupon, employees of Livestock Marketers, Inc. weighed the seven (7) hogs in three separate drafts and the following variances were noted: (App. 213).

Respondent		Livestock Marketers	Pound Variation	% Variation
Draft One				
(1 hog)	283	280	3	1.1
Draft Two				
(3 hogs)	672	665	7	1.04
Draft Three				
(3 hogs)	713	705	8	1.1

An additional fourteen (14) hogs were purchased by Respondent's agents on August 21, 1974, and seven (7) of these were dry-lotted until the morning of August 23. (App. 105-107). Thereupon, the hogs were weighed on Respondent's scale and carried to facilities of Livestock Marketers, Inc. to be sold. (App. 107-114). Variations were again found in the weights of the livestock: (App. 211).

Respondent		Livestock Marketers	Pound Variation	% Variation
Draft One (1 hog)	344	335	9	2.6
Draft Two (6 hogs)	1313	1300	13	.9

After this third visit by agents of the Respondent, the same identified themselves, revealed the purposes of their visit and asked to check the balance of Livestock Marketers, Inc. scale to test it for accuracy. (App. 124-125). The scale was found to be back balanced by five (5) pounds, and further testing indicated that based upon U. S. Government standards, the same was an acceptable scale for weighing livestock and was well within acceptable tolerances. (App. 124-125). The State of Georgia had tested the same scale on July 3, 1974, and had approved the accuracy of the scale. (R. 679). The only evidence of intentional short-weighing was the fact that the scale was found to be in a back balanced condition, (App. 124-125) and a witness for Respondent offered the opinion that the scale was placed in that condition willfully, (R. 43), and scale tickets, had not been issued (App. 235).

The transactions of the weighing of the hogs on each date complained of (August 15, 16, and 23, 1974) were with Petitioner Livestock Marketers, Inc., and no weighing by Petitioner Paulk and Batten Livestock Company, Inc. was shown or established. No wrongdoing was alleged, put in issue, or shown by the evidence with respect to Petitioner Paulk and Batten Livestock Company, Inc. (App. 235).

On June 24, 1976, Judge Baker handed down her decision and order. (App. 214-244). Petitioners, and each of them, were ordered to cease and desist from various practices involving short-weighing of livestock and were ordered suspended as registrants under the Act for a period of seven (7) days. (App.

243-244). On appeal by both the Petitioners and the Respondents to the Secretary of Agriculture, a decision and order was handed down on October 12, 1976, in which Petitioners were ordered to cease and desist from various practices as set out in the initial decision and order and in which the initial suspensions of seven (7) days were increased to thirty (30) days. (App. 245-268).

Petitioners appealed to the United States Court of Appeals for the Fifth Circuit which Court affirmed the decision and order of the Judicial Officer in its judgment rendered September 1, 1977. The per curiam opinion of the Court of Appeals is contained in the Appendix to this Petition. The Court of Appeals took jurisdiction based on Title 28, §§ 2342 and 2343 of the United States Code.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises Important and Recurring Questions Concerning the Disregard of the Corporate Entity in Applying Administrative Sanctions, and the Constitutional Ramifications Thereof, Absent a Finding of Wrongdoing.

The Supreme Court has held that in an administrative proceeding such as that at issue herein, the Secretary's choice of sanction is not to be overturned unless it is found to be unwarranted in law or without justification in fact. *Butz v. Glover Livestock Commission Company*, 411 U.S. 182 (1973). In its decision below, the Fifth Circuit affirmed the imposition of sanctions against Petitioner Paulk and Batten Livestock Company, Inc. In the same breath the Court conceded that,

"none of the short-weight disclosing purchases set out by Government agents involved Paulk and Batten. None of the violations found may be tied directly to that Corporate entity." (Appendix to Petition).

The opinion of the Fifth Circuit flies in the face of the *Glover* decision in that while no wrongdoing was alleged or shown against Petitioner Paulk and Batten Livestock Company, Inc. the sanction is nonetheless allowed to stand. Additionally, the Fifth Circuit abandons its own standard of review as announced in *Kent v. Hardin*, 425 F 2d 1346 (Fifth Cir. 1970).

"The function of a Court in reviewing administrative imposition of sanctions . . . (is) to see if they bear a reasonable relation to the practices which invoked them and if they evidence such a relation, to approve them." 425 F 2d 1349-1350.

Can any sanction, great or small, properly be imposed where no wrongdoing is found?

Bruhn's Freezer Meats of Chicago v. United States Department of Agriculture, 438 F 2d 1332 (Eighth Cir. 1971), affirmed a decision imposing a cease and desist order on both corporate and individual petitioners. The Court expressed fear that the individual petitioner might circumvent the sanction by gathering beneath the cloak of a new corporation. Such reasoning is inapposite to the facts herein. We deal not with individuals but with two distinct corporations. No showing has ever been made that Paulk and Batten Livestock Company, Inc., a corporation in existence since 1968, was meant to provide, or would be used as a cloak for the circumvention of sanctions against Livestock Marketers, Inc.

Sebastopol Meat Company v. Secretary of Agriculture, 440 F 2d 983 (Ninth Cir. 1971), affirmed sanctions against a corporate and individual petitioner. However, the individual involved was found to be the alter ego of the corporate petitioner. Here we deal not with sanctions against individuals on the basis of corporate acts, but with sanctions against two distinct corporations, based on acts of the one.

Corn Products Refining Company v. Benson, 232 F 2d 554 (Second Cir. 1956), involved a complaint under the commodity exchange act, in which sanctions were applied against the corporate petitioner and its wholly owned subsidiary, and the corporate entity was disregarded to give effect to the statute. However, the facts herein show once more a crucial distinction: two separate and distinct corporate entities as opposed to the wholly owned subsidiary in *Corn Products*.

In *Bangor Punta Operations, Inc. v. Bangor and Aroostook Railroad Company*, 417 U.S. 703 (1974) the Plaintiff sought damages for violations of the Federal Antitrust and Securities Laws. Where the real party in interest was a corporation owning 99% of the Plaintiff's stock, the Supreme Court opted to disregard the corporate form. Again, *Bangor Punta*, on its

facts, involved virtually total ownership of one corporation by the other. Petitioners herein are separate and distinct corporate entities.

It has long been settled that a corporation is a person entitled to the protection of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution. *Grosjean v. American Press Company*, 297 U. S. 233 (1936). Hence, a corporation's business is "property" within the meaning of the Constitutional provisions concerning due process of law. *Louis K. Liggett Company v. Baldridge*, 278 U.S. 105. On the facts disclosed herein, to disregard the corporate entity in order to bring Petitioner Paulk and Batten Livestock Company, Inc. within the ambit of the sanctions, and the suspension thereunder, is to deprive Paulk and Batten of property without the Due Process guarantees of the Fifth Amendment. Especially is this so in light of the fact that no wrongdoing whatsoever was alleged or found as against Paulk and Batten. It has been held that, "... an administrative order without factual support is without due process." *Garvey v. Freeman*, 397 F. 2d 600, 610 (Tenth Cir. 1968). In applying sanctions against Paulk and Batten Livestock Company, Inc. the Secretary, in effect, attempts to punish a party expressly found innocent of any wrongdoing, and absent the requisite factual support, such action is wholly outside the parameters of due process.

By reason of the foregoing, and the important and recurrent constitutional question raised by disregard of the corporate entity herein, the Court should grant Certiorari to review the decision below.

2. Serious Doubt Exists as to Whether the Finding of Wilful Violation of the Packers and Stockyards Act Was Supported by Substantial Evidence.

The scope of judicial review of facts where determination is made by the Secretary is limited to whether they are supported

by substantial evidence. *Butz v. Glover Livestock Commission Company*, 411 U.S. 182 (1973). Reference to the administrative procedure act (5 U.S.C. § 706(2)(E)) reveals that an administrative action thereunder should not be set aside unless unsupported by substantial evidence.

However, the "substantial evidence" rule should not be permitted to shield an administrative action, or the record on which it is based, from the searching light of judicial review. "Substantial evidence is more than a mere scintilla", and administrative orders cannot be justified without "... a basis in evidence having rational probative force." *Consolidated Edison Company v. NLRB*, 305 U.S. 197, 229-230 (1938). The reviewing court, in appraising the evidence, must consider the whole record. "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corporation v. NLRB*, 340 U. S. 474, 488 (1951).

Those items of evidence relied upon to find intentional short-weighting are as follows:

1. The fact that the scale used by Petitioner Livestock Marketers, Inc. was found to be in a back balanced condition;
2. The opinion testimony of an employee of Respondent, and one who participated in the investigation, that the scale was intentionally placed in a back balanced condition;
3. The fact that scale tickets were not issued to the sellers of livestock.

No other evidence whatsoever appears in the record to support a finding of wilful short-weighting. No employee of Livestock Marketers, Inc. was ever seen to place the scale in a back balanced condition. (see Statement of the Case). The record on which this administrative action and the resultant sanctions is based, is not supported by substantial evidence, but rather by

a "scintilla". A "mere scintilla" is not enough. *Consolidated Edison Company, supra*.

Additionally, it has been held that in the absence of prior warnings, a finding of wilfulness is erroneous. *Economou v. United States Department of Agriculture*, 494 F. 2d 519 (Second Cir. 1974). Here, the warning may have resulted in prompt correction of the scale. But, the only evidence of any prior warnings given to Petitioners is a letter written only to Livestock Marketers, Inc., in which there is no mention of short-weighing, but merely reference to alleged "weighing discrepancies." Nothing in the record indicates that Paulk and Batten Livestock Company, Inc. received any type of prior warning.

By reason of the foregoing, the court should grant Certiorari to review the decision below.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

G. HUGHEL HARRISON
P. O. Box 88
Lawrenceville, Georgia 30246

Certificate of Service

I hereby certify that on this 16th day of January, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to Ms. Freddi Lipstein and Mr. Ronald R. Glancz, Department of Justice, Civil Division, Appellate Section, Washington, D. C. 20530, Counsel for Respondent. I further certified that all parties required to be served have been served.

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APPENDIX

— A-1 —

STATUTORY AND REGULATORY ADDENDUM

The pertinent sections of the Packers and Stockyards Act, 7 U.S.C. 181 *et seq.*, provide:

7 U.S.C. 204:

§ 204. Bond and suspension of registrants

On and after July 12, 1943 the Secretary may require reasonable bonds from every market agency and dealer, under such rules and regulations as he may prescribe, to secure the performance of their obligations, and whenever, after due notice and hearing, the Secretary finds any registrant is insolvent or has violated any provisions of this chapter he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary or a court of competent jurisdiction. July 12, 1943, c. 215, § 1, 57 Stat. 422.

7 U.S.C. 208:

§ 208. Unreasonable or discriminatory practices generally; rights of stockyard owner of management and regulation

(a) It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

(b) It shall be the responsibility and right of every stockyard owner to manage and regulate his stockyard in a just,

reasonable, and nondiscriminatory manner, to prescribe rules and regulations and to require those persons engaging in or attempting to engage in the purchase, sale, or solicitation of livestock at such stockyard to conduct their operations in a manner which will foster, preserve, or insure an efficient, competitive public market. Such rules and regulations shall not prevent a registered market agency or dealer from rendering service on other markets or in occasional and incidental off-market transactions.

As amended July 31, 1968, Pub.L. 90-446, § 1(d), 82 Stat. 475.

7 U.S.C. 210(c):

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of sections 201-203 and 205-217a of this title, or concerning which any question may arise under any of the provisions of such sections, or relating to the enforcement of any of the provisions of such sections. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

7 U.S.C. 213(a):

§ 213. Prevention of unfair, discriminatory, or deceptive practices

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connec-

tion with determining whether persons should be authorized to operate at the stockyards, or with receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock.

7 U.S.C. 221:

§ 221. Accounts and records of business; punishment for failure to keep

Every packer or any live poultry dealer or handler, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than \$5,000, or imprisoned not more than three years, or both. Aug. 15, 1921, c. 64, § 401, 42 Stat. 168; Aug. 15, 1921, c. 64, § 503, as added Aug. 14, 1935, c. 532, 49 Stat. 649.

The pertinent sections of the Packers and Stockyards Administration, Department of Agriculture (Chapter II) Regulations 9 C.F.R. 201 *et seq.*, provide:

9 C.F.R. 201.49(a):

§ 201.49 Requirements regarding scale tickets evidencing weighing of livestock

(a) When livestock is weighed for purpose of purchase or sale, a scale ticket shall be issued which shall show: (1) The name and location of the agency performing the weighing service; (2) the date of the weighing; (3) the name of the buyer and seller or consignor, or a designation by which they may be readily identified; (4) the number of head; (5) kind; (6) actual weight of the livestock; and (7) the name, initials, or number of the person who weighed the livestock, or if required by State law, the signature of the weighmaster. Scale tickets issued under this section shall be serially numbered and sufficient copies executed to provide a copy to all parties to the transaction.

§ 201.46 Stockyard owners, market agencies, dealers, and licensees to keep daily record

(a) Each stockyard owner, in addition to other necessary records, shall make and keep an accurate record of the number of head of each class of livestock received, shipped, or disposed of locally each day. Each market agency or dealer buying or selling livestock on a commission basis or otherwise, except packer buyers registered as dealers to purchase livestock for slaughter only, in addition to other necessary records, shall make and keep an accurate record of the number and weight of livestock bought, sold, or otherwise disposed of each business day, the prices paid or received therefor, and the charges made for services.

(b) Each licensee buying or selling live poultry on a commission basis or otherwise, in addition to other necessary records, shall make and keep an accurate record of the number of pounds of live poultry bought or sold each

business day, the prices paid or received therefor, and the charges made for services and facilities.

[19 F.R. 4528, July 22, 1954, as amended at 24 F.R. 3183, Apr. 24, 1959]

9 C.F.R. 201.55:

§ 201.55 Purchases and sales to be made on actual weights

When livestock or live poultry is bought or sold on a weight basis in transactions subject to the provisions of the act, settlement therefor shall be on the basis of the weight shown on the scale ticket or correction ticket, as the case may be. Any weight figures shown on accounts of sale, accounts of purchase, invoices, bills, or statements issued in connection with transactions subject to the act shall be actual weights obtained on scales operated or used by stockyard owners, market agencies, dealers, or packers, in the case of livestock, or on scales operated by licensees, in the case of live poultry, at the place and at the time of the consummation of the transactions in question or, if not, shall be appropriately explained on the accounting, bills, or statements issued.

[19 F.R. 4530, July 22, 1954, as amended, 24 F.R. 3183, Apr. 24, 1959]

9 C.F.R. 201.71:

§ 201.71 Accurate weights

Each stockyard owner, market agency, dealer, or licensee who weighs livestock or live poultry shall install, maintain, and operate the scales used for such weighing so as to insure accurate weights. All livestock scales shall be equipped with a type-registering weigh-beam, a dial with a me-

chanical ticket printer, or a similar device which shall be used for printing or stamping the weight values on scale tickets.

[32 F.R. 13233, Sept. 20, 1967]

9 C.F.R. 201.72:

§ 201.72 Scales: testing of

Each stockyard owner, market agency, dealer, or licensee who weighs livestock or live poultry for purposes of purchase or sale or who furnishes scales for such purposes shall cause such scales to be tested properly by competent agencies at suitable intervals in accordance with instructions of the Administrator, copies of which will be furnished to each stockyard owner, market agency, dealer, or licensee. [24 F.R. 3183, Apr. 24, 1959, as amended at 26 F.R. 1626, Feb. 24, 1961; 32 F.R. 7700, May 26, 1967]

9 C.F.R. 201.73-1(a)(1):

(a) *Balancing the empty scale.* (1) The empty scale shall be balanced each day before weighing begins, and maintained in correct balance which weighing operations continue. The zero balance shall be verified at intervals of not more than 15 drafts or 15 minutes, whichever is completed first. In addition, the zero balance of the scale shall be verified whenever a weigher resumes weighing duties after an absence from the scale and also whenever a load exceeding half the scale capacity or 10,000 pounds (whichever is less) has been weighed and is followed by a load of less than 1,000 pounds, verification to occur before the weighing of the load of less than 1,000 pounds.

United States Court of Appeals
For the Fifth Circuit

October Term, 1976

No. 76-4500

Summary Calendar

Livestock Marketers, Inc. and Paulk and Batten Livestock
Company, Inc.,

Petitioners,

versus

United States of America,

Respondent.

Petition for Review of an Order of
U. S. Department of Agriculture (Georgia Case)

Before GOLDBEG, CLARK and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Livestock Marketers, Inc. and Paulk and Batten Livestock Company, Inc. for review of an order of the U. S. Department of Agriculture; and was taken under submission by the Court upon the record and briefs on file; pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the U. S. Department of Agriculture in this cause be, and the same is hereby affirmed;

It is further ordered that petitioners pay to respondent, the costs on appeal to be taxed by the Clerk of this Court.

September 1, 1977

Issued as Mandate: Oct. 28, 1977.

LIVESTOCK MARKETERS, INC. and
Paulk and Batten Livestock
Company, Inc., Petitioners,

v.

UNITED STATES of America,
Respondent.

No. 76-4500

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Sept. 1, 1977.

Two corporate livestock dealers petitioned for review of an order of the Department of Agriculture suspending both dealers as registrants under the Packers and Stockyards Act and requiring the dealers to cease and desist from practices allegedly in violation of the Act. The Court of Appeals held that: (1) substantial evidence supported the finding that the scale at the stockyard at which the dealers did business had been intentionally back-balanced to cause short weighing of livestock; (2) the suspension for 30 days was not unreasonably lengthy, and (3) under the unusual circumstances wherein the two corporate entities were owned and managed by the same individuals and functioned largely as a single entity using the same stockyard facility and achieving a single profit, it was within the authority of the Secretary of Agriculture to suspend both corporations for 30 days, even though none of the violations discovered could be tied directly to one of the corporations.

Order affirmed.

* Rule 18, 5 Cir., *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

1. Trade Regulation Key 872

Evidence relating to three separate sales of hogs by representatives of the Department of Agriculture to registered livestock dealer sufficiently supported conclusion that livestock dealer had violated the Packers and Stockyards Act by intentionally back-balancing scale at stockyard in order to cause short weighing of livestock. Packers and Stockyards Act, 1921, §§ 1 et seq., 312, 7 U.S.C.A. §§ 181 et seq., 213.

2. Trade Regulation Key 872

In view of fact that 30-day suspension for short weighing was not without precedent and was a reasonable deterrent to violations in an area of serious concern, suspension of registered livestock dealers for 30 days upon finding that the dealers had intentionally back-balanced a livestock scale to cause short weighing was not unreasonably lengthy. Packers and Stockyards Act, 1921, §§ 1 et seq., 312, 7 U.S.C.A. §§ 181 et seq., 213; Department of Agriculture Appropriation Act, 1944, § 1, 7 U.S.C.A. § 204.

3. Trade Regulation Key 872

Where circumstances surrounding operations of two corporate registered livestock dealers included fact that the corporations were owned by the same four individuals and managed by the same three and that, prior to finding that one of the corporations had violated the Packers and Stockyards Act by intentionally back-balancing livestock scale to cause short weighing, the Department of Agriculture had warned both corporations with respect to the same set of scales and where the corporations did not deal at arm's length but functioned largely as a single entity using the same stockyard facility and achieving a single profit on many transactions, it was within the authority of the Secretary of Agriculture to suspend both corporations as registrants

under the Act for 30 days even though none of the violations found could be tied directly to one of the corporations. Packers and Stockyards Act, 1921, § 312, 7 U.S.C.A. § 213; Department of Agriculture Appropriation Act, 1944, § 1, 7 U.S.C.A. § 204.

On Petition for Review of an Order of U. S. Department of Agriculture (Georgia Case).

Before GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM:

Appellants challenge an order of the Secretary of Agriculture. Appellant Livestock Marketers, Inc. is registered with the Secretary as (1) a market agency to buy and sell livestock on a commission basis at Livestock Marketers Inc., Douglas, Georgia, a posted stockyard subject to the provisions of the Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181 *et seq.* (hereinafter "the Act"), and (2) as a dealer to buy and sell livestock in commerce. Appellant Paulk and Batten Livestock Company, Inc., also does business at the Livestock Marketers, Inc. facility at Douglas, Georgia, and is registered with the Secretary as a dealer to buy and sell livestock in commerce. The same four individuals own the two appellant corporations in equal shares.

On the basis of three separate sales of hogs by representatives of the Department of Agriculture to appellant Livestock Marketers, Inc., the Judicial Officer¹ below concurred in the conclusion of the Administrative Law Judge that Livestock Marketers,

¹ The Secretary of Agriculture has delegated to the Judicial Officer final administrative authority to decide the department's cases subject to the Administrative Procedure Act. Representatives of the department instituted the case at bar by filing a complaint against appellants, who were respondents below.

Inc., "knowingly weighed livestock at less than their true and correct weights and to facilitate such shortweighing did not issue scale tickets to the sellers of such livestock," in violation of 7 U.S.C. § 213 and applicable regulations thereunder. See 9 CRF §§ 201.46, 201.49, 201.71, 201.73-1. The Judicial Officer thereupon ordered both appellants to cease and desist from the violative practices; additionally, he suspended both appellants as registrants under the Act for 30 days. See 7 U.S.C. § 204.

[1, 2] Appellants attack the adequacy of the record to support either the finding of statutory violations or the length of the suspension sanction. Both of these attacks fail in light of the narrow applicable standards of judicial review. Substantial evidence supports the conclusion that the scale at the Livestock Marketers, Inc. facility had been intentionally back-balanced to cause shortweighing. Regarding the length of the suspension, the Supreme Court has recently stated that the Secretary's choice of sanction is not to be overturned unless "unwarranted in law or without justification in fact." *Mutz v. Glover Livestock Comm'n Co., Inc.*, 411 U.S. 182, 185-86, 93 S.Ct. 1455, 1458, 36 L.Ed.2d 142 (1973). The 30 day sanction for shortweighing even in the relatively slight percentages here is not without precedent; we cannot quarrel with the reasonableness of its selection as a deterrent to violations in this area of serious concern.

[3] Appellants' most troubling objection is to the application of any sanction to Paulk and Batten Livestock Company, Inc. None of the short-weight disclosing purchases set up by government agents involved Paulk and Batten. None of the violations found may be tied directly to that corporate entity.

Nonetheless the Judicial Officer reasonably determined that a suspension sanction applied only to Livestock Marketers would in these peculiar circumstances amount to no sanction at all. Livestock Marketers sells almost all its livestock to Paulk and Batten, which sells to packers. Ownership of the two entities is

identical. Of the four owners, the same three manage operations of the two companies. The record discloses many transactions in which from the time livestock is sold from Livestock Marketers through Paulk and Batten to a packer, only a single mark-up is taken. Thus the two appellants do not deal at arms length, but function largely as a single entity, using the same facility and achieving a single profit.

In similar circumstances the Secretary has found it necessary to issue cease and desist orders to owners of corporations in their individual capacities. The courts have upheld such veil-piercing orders as necessary to effect the statutory scheme, despite the lack of direct authorizing language. See *Bruhn's Freezer Meats of Chicago, Inc. v. United States Department of Agriculture*, 438 F.2d 1332 (8th Cir. 1971); *Sebastopol Meat Company v. Secretary of Agriculture*, 440 F.2d 983 (9th Cir. 1971). In the unusual circumstances here, when both appellants functioned to a great extent as a single entity prior to the finding of the violation and where the department warning regarding weighing discrepancies put both corporations on notice with respect to the same set of scales some nine months prior to the violation, application of the suspension sanction to both was within the authority of the Secretary. We emphasize that this conclusion is strictly tied to the complete identity of ownership, operation, income, and facilities of the two appellants.

The order of the Secretary is AFFIRMED.

In the United States Court of Appeals
For the Fifth Circuit

—————
No. 76-4500
—————

Livestock Marketers, Inc. and Paulk and Batten Livestock Com-
pany, Inc.,

Petitioners,

versus

United States of America,

Respondent.

—————
On Petition for Review of an Order of
U. S. Department of Agriculture
(Georgia Case)
—————

ON PETITION FOR REHEARING

(October 20, 1977)

Before GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the
above entitled and numbered cause be and the same is hereby
DENIED.

ENTERED FOR THE COURT:

IRVING L. GOLDBERG
United States Circuit Judge

77-1019

Supreme Court, U. S.
FILED

JAN 27 1978

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. . .

LIVESTOCK MARKETERS, INC. and PAULK AND BATTEN
LIVESTOCK COMPANY, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL APPENDIX

**To the Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit**

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Attorneys for Petitioners



IN THE
SUPREME COURT OF THE UNITED STATES

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LIVESTOCK MARKETERS, INC. and PAULK AND BATTEN
LIVESTOCK COMPANY, INC.,
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SUPPLEMENTAL APPENDIX
To the Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

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United States Department of Agriculture
Before the Secretary of Agriculture

In re:

Livestock Marketers, Inc., and	} P. & S. Docket
Paulk and Batten Livestock	
Company, Inc.,	
Respondents.	No. 5141

DECISION AND ORDER

(Dated June 24, 1976)

Preliminary Statement

This is an administrative proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181 *et seq.*), herein sometimes referred to as the Act, instituted by a Complaint filed April 24, 1975, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture.

The Complaint charges, *inter alia*, that Livestock Marketers, Inc., and Paulk and Batten Livestock Company, Inc., hereinafter sometimes referred to as the Respondents, wilfully violated the Act and the Regulations, as more specifically set forth in the allegations therein.

On May 16, 1975, the Respondents, through counsel, filed an Answer and a Response to the Complaint and requested an oral hearing. On October 7, 1975, attorney for Complainant moved to assign a date for Oral Hearing. On October 22, 1975, the prehearing and oral hearing date was designated for

November 6, 1975. Pursuant to Motion by Complainant, the oral hearing date was reset for January 13, 1976, and subsequently reset for January 14, 1976.

The oral hearing herein took place on January 14 and 15, 1976, in Valdosta, Georgia, before Administrative Law Judge Dorothea A. Baker, United States Department of Agriculture. Respondents were represented by G. Hughel Harrison, Esquire, 151 Pike Street, North, P. O. Box 88, Lawrenceville, Georgia 30245. Complainant was represented by John E. Ford, Esquire, and Allan R. Kahan, Esquire, Office of the General Counsel, United States Department of Agriculture. The transcript consists of 614 pages. In due course, counsel for the respective parties filed briefs, the last brief having been filed April 30, 1976.

Pertinent statutory provisions and applicable regulations are:

Section 312 of the Packers and Stockyards Act (7 U.S.C. 213) provides, *inter alia*, that:

(a) *It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with * * * receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock.*

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subsection (a) of this section, *the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.* (Emphasis supplied)

Section 401 of the Act (7 U.S.C. 221) provides, *inter alia*, that:

Every * * * dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business * * *.

Section 307 of the Act pertains to the duty of stockyard owners and market agencies relative to unreasonable or discriminatory practices generally.

Allegations of the Complaint allege violations of sections 201.46a, 201.49, 201.55, 210.71, and 201.73-1 of the regulations. Pertinent provisions thereof are as follows:

Section 201.46 (9 CFR 201.46 which provides, *inter alia*, that:

* * * * *

Each * * * dealer buying or selling livestock on a commission basis * * * in addition to other necessary records, shall make and keep an accurate record of * * * weight of livestock * * * sold * * *.

Section 201.49 (9 CFR 201.49) which sets forth, *inter alia*, that:

(a) When livestock is weighed for purpose of purchase or sale, a scale ticket shall be issued * * *.

* * * * *

(c) * * * dealers who own or operate livestock scales shall be responsible for the accurate weighing of livestock and the execution and issuance of scale tickets.

Section 201.55 (9 CFR 201.55) provides, *inter alia*, that:

When livestock * * * is bought or sold on a weight basis in transactions subject to the provisions of the act, settlement therefor shall be on the basis of the weight shown on the scale ticket or correction ticket, as the case may be. Any weight figures shown on accounts of sale, accounts of purchase, invoices, bills, or statements issued in connection

with transactions subject to the act shall be actual weights obtained on scales operated or used by * * * dealers * * * at the place and at the time of the consummation of the transactions in question or, if not, shall be appropriately explained on the accounting bills, or statements issued.

Section 201.71 (9 CFR 201.71) sets forth, *inter alia*, that:

Each stockyard owner, market agency, dealer * * * who weighs livestock * * * shall install, maintain, and operate the scales used for such weighing so as to insure accurate weights.

Section 201.73-1 (9 CFR 201.73-1) provides, *inter alia*, that:

Stockyard operators, * * * dealers * * * who operate scales on which livestock is weighed in purchase or sales transactions are responsible for the accurate weighing of such livestock. * * * Weighers must acknowledge their receipt of these instructions and agree to comply with them, by signing in duplicate P&SA Form 215 provided by the Packers and Stockyards Administration.

(a) *Balancing the empty scale.* (1) The empty scale shall be balanced each day before weighing begins, and maintained in correct balance while weighing operations continue. * * * In addition, the zero balance of the scale shall be verified whenever a weigher resumes weighing duties after an absence from the scale * * *.

* * * * *

(4) * * * A scale equipped with a balance indicator is correctly balanced when the pointer comes to rest at zero.

* * * * *

(c) *Recording the weight.* (1) The weight of each draft shall be recorded immediately after the load balance is obtained and before any poises are moved or the load is removed from the scale platform. The weigher shall make certain that the printed weight record agrees with the

weight value visually indicated when correct load balance is obtained. He shall also assure himself that the printed weight value is distinct and legible.

* * * * *

(e) *Weigher's responsibilities.* (1) The primary responsibility of a weigher is to determine and accurately record the weight of livestock drafts without prejudice or favor to any person or agency and without regard for livestock ownership, price, condition, fill, shrink, or other considerations.

Findings of Fact

1. Livestock Marketers, Inc., is a corporation with its principal place of business located at Douglas, Georgia. Respondent Livestock Marketers is, and at all times material to the complaint, was: (a) engaged in the business of buying and selling livestock in commerce for its own account, and buying livestock in commerce on a commission basis; and (b) registered with the Secretary of Agriculture as a market agency to buy and sell livestock on a commission basis at Livestock Marketers, Inc., Douglas, Georgia, a posted stockyard subject to the provisions of the Act, and as a dealer to buy and sell livestock in commerce.

2. Respondent Paulk and Batten Livestock Company, Inc., is a corporation doing business at the Livestock Marketers, Inc., facility located at Douglas, Georgia. Respondent Paulk and Batten, at all times material herein, was (a) engaged in the business of buying and selling livestock in commerce for its own account; and (b) registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. The officers of respondent Paulk and Batten and of respondent Livestock Marketers, as recorded on their respective registrations filed with the Secretary of Agriculture, are as follows:

Paulk and Batten Livestock

Company, Inc.

Livestock Marketers, Inc.

Herbert Batten—President	Secretary-Treasurer
Thurston Paulk—Vice President	Vice President
Johnny Batten—Secretary-Treasurer	Director
Marvin Giddens—Director	President

Each of the above-named parties, according to the annual reports filed with the Packers and Stockyards Administration for 1973 and 1974, owned 25 percent of the stock of each corporation.

4. The individuals listed below are, in addition to their owner/officer capacities as set forth in Finding of Fact No. 3, employees of both corporations as follows:

Paulk and Batten Livestock Company, Inc.

Livestock Marketers, Inc.

Thurston, Paulk—Manager	Manager
Herbert Batten—Assistant Manager	Assistant Manager
Johnny Batten —————	Weigher and Office Clerk

There is a very real possibility of using one corporate entity to avoid a suspension period levied on the other.

5. On August 14, 1974, employees of Complainant purchased 21 hogs in Hawkinsville, Georgia. Seven of these hogs were to be used in a direct sale type weighing investigation of Respondents' operation at the facility at Douglas, Georgia, on August 15, 1974. Seven of the 21 hogs purchased were to be used in the transaction with Respondents on August 15, 1974; seven of the hogs purchased that day were to be used in connection

with the transaction with Respondents on August 16, 1974; and seven of the 21 head were not used in connection with the investigation of the Respondents' operation. The 21 head of hogs had come through auction at the Hawkinsville market and had not had access to feed or water during the course of that day (August 14). The seven head intended to be sold to the Respondents on August 15 were placed in a "dry lot", with no access to feed or water. This was done at the completion of the sale on August 14. These seven hogs were locked in the pen and the key to the lock kept by employees of the Complainant. The other 14 head of hogs, upon the completion of the sale, were placed in a pen with a trough and a minimum of corn—i.e., one bushel of corn of which a portion was fed to those hogs that night.

6. The identity of each of the hogs used in this type of investigation was maintained by using size, color scheme, and species. It was testified that hogs are purchased that fit certain weight categories so that when sold the hogs will be classified into different classifications. After purchase, no one remained with the hogs at all times. However, during the hours between the various weighings made of each of the hogs involved on the three transaction dates, the hogs were in the custody and control of either Mr. Pichard or Mr. Stephens, or both.

A direct sale investigation utilizes two trucks which are owned by the government. One truck is a two-ton Dodge, equipped with a single-animal scale mounted on the truck bed. This is a 3,000 pound capacity single-animal scale graduated in one pound increments. Carried on this truck are 1,500 pounds of 50 pound standard test weights that are used to test the scale for accuracy just prior to any weighing of livestock on the truck. Before the scale upon this truck is used, the truck is leveled by the use of jacks and checked with a split-level to make sure the truck bed is level. Then tension is taken off the springs before employees of the Complainant commence testing the scale

on the truck. This refers to jacking up the rear of the truck bed and does not involve removing tension from the front springs. Respondents on brief seek to establish that inasmuch as each weighing on the mobile scales followed a procedure whereby the mobile scales were not isolated from the affect of the front springs of the truck that this affected the stabilization and levelness, thus entering into the validity of the accuracy of the scales. The evidence of record does not support this contention of Respondents. The second truck is a three-quarter ton pickup, and is used to carry the livestock from the larger truck equipped with the scales to the particular market being investigated.

8. A one pound error is possible on Complainant's scale. The scales of Respondents were five pound basis with a two and one-half pound break of the beam with a two-pound tolerance.

9. Early on the morning of August 15, the employees of Complainant returned to the Hawkinsville market. The gate to the pen holding the seven hogs which had been dry-lotted the night before was still locked, and was unlocked by the Complainant's employees. The larger of the two government trucks was then blocked and leveled. The brackets on the scale that holds the weigh-bridge in place during transit of the truck was then released, and the weigh-beam on the single-animal scale was then installed. The bracket holding the steel-yard was loosened and turned to prevent any interference with the scale operation. The scale was then tested by Complainant's employees to determine its accuracy. As this testing process was conducted, the employees recorded the results of the testing on a scale test report. The evidence of record shows the maximum error of the scale that morning to be four ounces, and that error only in the 400 to 500 pound range. The test report showed no error at all in the 200-400 pound range, the range that all seven of the individual hog weighings fell into that morning. The scale was tested using the standards set by Memo No. 1, "Instructions for Testing Livestock and Animal Scales."

10. The hogs were identified by Mr. Morgan Stephens, Complainant's employee, to Mr. Doug Pichard, also Complainant's employee, who then wrote the information down on the scale ticket, weighing the hogs himself. The hogs were identified by Mr. Stephens. Each of the hogs was identifiable one from the other. The identifying characteristics were then called out to Mr. Pichard as he weighed the hogs. Mr. Pichard verified the identifying remarks made by Mr. Stephens, and then wrote down the identity on the scale tickets as he weighed the hogs. The identifying marks appear on the P&S scale tickets.

11. The hogs were then weighed for the first time that morning. The scale was well within tolerance and accurate for weighing livestock. Mr. Stephens drove the animals individually onto the scale platform, closing the on-gate. Mr. Pichard recorded the individual weights on the hogs in Complainant's exhibit no. 2. The weights were recorded onto seven P&S scale tickets on the morning of August 15, between 7:15 a.m. and 7:26 a.m. The weights appearing on such scale tickets were printed by the weigh-beam of the scale itself.

12. The scale on the truck was then broken down. Both employees of Complainant then drove toward the vicinity of Douglas, Georgia, to a wayside park four miles north of Douglas on Georgia highway 441. Upon arrival at the wayside park, Mr. Stephens and Mr. Pichard went through the same procedures they had utilized earlier that morning—setting up the truck, leveling it, taking the tension off of the springs, and testing the single-animal scale that is mounted on the scale platform of the larger government truck. The scale was again tested in compliance with the provisions of Scales and Weighing Memorandum No. 1—"Instructions for Testing Livestock and Animal Scales," Complainant's exhibit no. 14. The results of that scale test were again recorded and such recordation appears as Complainant's exhibit no. 3. The results of the test were recorded at the time the test was made. The test showed no error on the scales up to

the 500 pound bracket, at which point a four-ounce error was evident. The scale was therefore well within tolerance and accurate for weighing livestock. Again Mr. Stephens identified the hogs as they were weighed and Mr. Pichard weighed the hogs under Mr. Stephen's supervision. Mr. Pichard weighed and recorded the weights of these seven hogs, individually, between 9:11 and 9:25 a.m. and initialed the weighing tickets.

13. After each individual weighing, the hogs were loaded onto the pickup truck which was backed up to the larger government truck. Mr. Stephens then left with the hogs, driving to the Respondents' facility. The odometer reading was taken on the truck so that the distance between the wayside park and the respondents' facility could be recorded. Upon arrival at Respondents' facility, Mr. Stephens was greeted by Cecil Grantham and R. C. Brown.

14. Mr. Grantham weighed the hogs and weighed them in two separate drafts. Mr. Grantham, on behalf of the Respondents, did not print a weighing ticket during the weighing of the seven hogs. He simply wrote a weight down on what was later received as a sales ticket. It was not a scale ticket with a printed weight, but simply an invoice with a written weight. Mr. Grantham gave Mr. Stephens a sales ticket, which appears as Complainant's exhibit No. 4 as a copy of the sales ticket handed him by Mr. Grantham and testified that he then took the sales ticket to the front office whereupon a check was issued in payment for the livestock. Such check appears on the bottom of Complainant's exhibit No. 4.

15. Mr. Stephens prepared Complainant's exhibit No. 5, which is a weighing record reflecting the weights of the seven hogs on all three occasions of their weighing on August 15, 1974. Complainant's employees had weighed the seven hogs individually on both occasions that morning, and the Respondents' employees weighed the hogs in two separate drafts, as

reflected by Complainant's exhibit No. 5. Mr. Stephens compared the weights taken earlier that day with the weights supplied him by Respondents, and determined that he had been shortweighed eighteen pounds, nine pounds of which was attributable to the white sow, and nine pounds attributable to the other six hogs.

The decision was then made to sell to the Respondents another load of hogs the next day, August 16, 1974.

16. Complainant's employees returned to Hawkinsville that afternoon and selected the hogs which were to be sold to the Respondents the next day, August 16. These seven hogs were taken off feed and water and put into a dry-holding pen. The gate was again secured with a chain and lock. Mr. Stephens and Mr. Pichard returned to Hawkinsville at around 7:00 a.m. on the morning of August 16 finding the gate on the pen still locked. Mr. Stephens was able to identify each and every one of the seven hogs separate from the other six. They had in fact been sorted out the night before so that they could be positively identified.

17. The truck was set up in the same manner as it had been set up on August 15, the day before. The scale was tested early that morning using the same procedures as had been used on the morning of the 15th. The scale was once again tested pursuant to the criteria and standards set by Scales and Weighing Memorandum No. 1, "Instruction for Testing Livestock and Animal Scales", Complainant's exhibit No. 14. The results of that test were written down at the time the test was made, and were written down on the scale test report, a copy of which appears as Complainant's exhibit No. 6, page 1. The scale report again shows an inaccuracy only to four ounces, and that inaccuracy only in the 400 to 500 pound weight range. This inaccuracy would be well within the one pound tolerance. The seven animals weighed that morning all fell within the 200 to

300 pound range, a range where there was no inaccuracy at all shown on the scale test report.

18. The hogs were then weighed much as they had been in connection with the transaction the day before. Mr. Stephens identified the hogs and called out the identification to Mr. Pichard. Mr. Pichard actually weighed the hogs, and recorded the weight upon scale tickets furnished by the United States Department of Agriculture. The scale tickets appearing in Complainant's exhibit no. 6 were the scale tickets completed by Mr. Pichard. Mr. Morgan Stephens observed Mr. Pichard's weighing, as well as observing him writing down the identifications that Mr. Stephens called out.

19. Upon completion of the weighing, the scales were broken down and both trucks and the hogs were moved to Douglas, Georgia, this being later in the morning on the 16th. Complainant's employees, the trucks and the hogs were taken to a Texaco station on the south side of town, on highway 41. This Texaco station, near the railroad tracks, was two and one tenth miles from the Respondents' facility.

20. The scale was then prepared for weighing, as it had been before. It was balanced, blocked, stabilized, and a test of the scale was made. The scale test was made following the instructions of memorandum No. 1, as it had been before. Mr. Stephens made another scale test report that morning as the scale was being tested. Such scale test report found a four-ounce variation between the 300 and 500 pound weight areas. Under such conditions the scale would be accurate for weighing livestock.

21. Mr. Stephens identified the hogs, calling out the identifying marks, and Mr. Pichard wrote down the designations as they were called out. Mr. Stephens observed the weighing performed by Mr. Pichard. Mr. Pichard weighed each of the seven hogs, individually recorded the weights of each of the seven hogs utilizing the scale and initialed the P&S scale tickets.

22. The seven hogs were then loaded onto the small government pickup truck. Mr. Stephens transported these seven hogs to the Respondents' facility. The hogs were offered for sale to the Respondents.

23. Mr. Stephens asked that three of the seven hogs be weighed separately, and this was done to obtain an additional weighing of a smaller number of head. Mr. Herbert Batten was physically present, operating the Respondents' scale that morning. The Respondents provided two sales invoices to Mr. Stephens that morning, as shown by Complainant's exhibit no. 8, page 1, and page 2. Mr. Batten separately wrote down the weights of the two drafts of hogs, and wrote down the weight of the one draft of three head of hogs. Mr. Stephens took the invoices to the Respondents' office to get payment, and was issued two checks.

24. Mr. Stephens compared the weights obtained on the government scale a few minutes earlier with the weights handwritten by Mr. Batten and found there were considerable differences. Mr. Stephens and Mr. Pichard both prepared and both signed a "weighing record" reflecting the weights obtained earlier on the government scales with the weights offered by the Respondents. The comparison produced a difference in the weight figures of 18 pounds. The results showed that there had been shortweighing of eight pounds on three hogs sold through Mr. Stephens' son's name; seven pounds on the three hogs sold in his name and three pounds on the one heavy gilt that was sold in Mr. Stephens name.

Mr. Stephens and Mr. Pichard got together and decided to sell the firm another load of hogs the following week.

25. An order for 14 hogs was placed with the Hawkinsville, Georgia, market the following week, on August 21, 1974. Fourteen hogs were needed to complete the two investigations the Complainant's employees were conducting. Seven head were

needed to complete the investigation of the Respondents. The hogs were divided into two groups on the evening of the 21st. The seven hogs to be used in the investigation of the Respondents were dry-lotted on the evening of August 22nd, and the pen locked. Complainant's employees returned to the pens at the Hawkinsville market the following morning around 7:30, this being August 23, 1974.

26. The same procedure was followed in setting up the truck as had been followed on the 15th and 16th of August. The truck was blocked and stabilized and the scales on the truck were tested. The scale test report shows a four-ounce error in the 400 to 500 pound range, and would mean the scale was accurate for weighing livestock.

27. The hogs were each identifiable one from the other. During this weighing process, Mr. Griff Bonham selected and ran the hogs up to the scale platform, Mr. Morgan Stephens identified the hogs to Mr. Pichard, and observed Mr. Pichard weighing the hogs. Mr. Pichard weighed the hogs individually and recorded the weights.

28. For the third time in as many days, the scales were broken down and the truck was moved to the vicinity of Douglas, Georgia. The three employees of the Complainant, the trucks, and the hogs all went to the first spot used on the August 15th transaction, the wayside park four miles from the Respondents' facility in Douglas, Georgia. The truck was again set up and stabilized.

29. The scales were again set up and tested as they had been before. The scales were tested in compliance with the instructions set forth in the aforesaid USDA memorandum No. 1, and a scale test report was made at the time of such scale test. The scale test report showed a four-ounce error in the 400 to 500 pound weight range and was within the tolerances acceptable for weighing livestock.

30. The seven hogs were then run onto the scale and weighed individually. Mr. Stephens placed the hogs on the scale and identified them for Mr. Pichard and observed his weighing and Mr. Bonham ran the hogs onto the pickup adjacent to the large truck. Mr. Pichard actually conducted the weighing, and recorded each of the individual weights onto P&SA scale tickets. Mr. Pichard prepared and initialed these seven scale tickets.

31. These hogs were then loaded onto the pickup truck and were taken to the Respondents' facility. The hogs were unloaded at the Respondents' facility with the assistance of J. C. Brown.

32. The livestock were weighed in at the Respondents' facility by Mr. Herbert Batten. The weights of the seven head of hogs were recorded in two drafts and were submitted to Mr. Stephens on a sales ticket. Complainant's exhibit No. 12 is a copy of the invoice Mr. Batten gave Mr. Stephens. The weights of the livestock were again written by hand, and were not printed by the scale. Mr. Stephens observed the weighing. The sales ticket was presented to an employee of the Respondents in the front office, and after some discussion pertaining, among other things, to the price of the extra heavy gilt, Respondents paid for the seven hogs.

33. Mr. Stephens also made a compilation of the various weights taken by the government and by the Respondents on the August 23 transaction. Complainant's exhibit No. 13 is a copy of the weighing record prepared the morning of August 23, 1974, by Mr. Stephens. There was a 22 pound difference in the weights obtained by Complainant's employees and the weights obtained by the Respondents. Mr. Stephens computed that he had been shortweighed by twenty two (22) pounds, i.e., nine pounds on the heavy Hampshire gilt, and 13 pounds on the six butcher hogs.

34. Mr. Bonham, Mr. Pichard, and Mr. Stephens then revealed the purpose of their visit to the Respondents' facility, and stated that they wanted to check the balance of the Respondents' scale and test it for accuracy. The scale was found to back-balanced five pounds. This was determined by adding known weight to the scale platform to the amount needed to bring the balance indicator on the scale to the center of the target area. It took five full pounds to make the indicator balance at zero.

35. Mr. Pichard left, and returned with 1,500 pounds of 50 pound test weights that were carried on the large truck. On numerous occasions Mr. Pichard has tested scales like the one used by the Respondents. Mr. Pichard tested this scale in compliance with the provisions of memorandum No. 1, "Instructions for Testing Livestock and Animals Scales." Mr. Pichard prepared a livestock scale test report as he tested Respondents' scales that day and asked Mr. Herbert Batten to sign such scale test report as a witness to the testing of the scale. Based upon the standards set by the United States Government, and Mr. Pichard's testing, the Respondents' scale was found to be an acceptable scale for weighing livestock and was well within acceptable tolerances. The State of Georgia had tested the same scale on July 3, 1974, one month earlier, and had approved the accuracy of the scale.

36. Respondents' scale was accurate for weighing livestock on the three dates in question.

37. A copy of Scales and Weighing Memorandum No. 3, "Instructions for Weighing Livestock," had been supplied to the Respondents, and the Respondents had acknowledged reading such instructions, agreeing to comply fully with said instructions. Complainant's exhibit No. 22, "Instructions for Weighing Livestock," a card to be posted conspicuously near the Respondents' livestock scale, was received into evidence by stipu-

lation. The card was posted near the scale operated by the Respondents.

38. During the months noted below, Livestock Marketers, Inc., on a dealer basis, sold the following percentage of its total monthly volume of sales to Paulk and Batten, Inc., Douglas, Georgia:

(a) In the month of January 1974 approximately ("approximately" means less than one-percent deviation) 91 percent of the volume of hogs sold by Livestock Marketers was sold to Paulk and Batten, Inc.;

(b) In the month of March 1974, approximately 86 percent was sold to Paulk and Batten;

(c) In the month of April 1974, approximately 98 percent was sold to Paulk and Batten;

(d) In the month of August, 1974, approximately 94 percent was sold to Paulk and Batten; and

(e) In the month of September 1974, approximately 90 percent of the hogs sold on a dealer basis by Livestock Marketers were sold to Paulk and Batten, Inc.

39. The stock ownership of Livestock Marketers, Inc., consists of 25 percent of such stock owned by Herbert Batten; 25 percent owned by Johnny Batten; 25 percent owned by Thurston Paulk, Jr.; and 25 percent owned by Marvin Giddens. The stock ownership of Paulk and Batten, Inc., consists of 25 percent of such stock owned by Herbert Batten; 25 percent owned by Johnny Batten; 25 percent owned by Thurston Paulk, Jr.; and 25 percent owned by Marvin Giddens.

40. During the period from July 1, 1973, to June 30, 1974, Livestock Marketers, Inc., bought \$7,071,189.09 worth of livestock on a dealer basis. During the period from March 1,

1973, to February 28, 1974, Paulk and Batten, Inc., bought \$20,240,875.85 worth of livestock on a dealer basis.

41. On brief, 'Complainant sets forth, by way of summarization of the testimony and the exhibits of record, the Packers and Stockyards "catch" and "sale" (accurate) weights on the three days which were involved in the allegations of the Complaint, as well as the discrepancies between the accurate weights and the weights offered by the Respondents.

42. Respondents point out that the August 15, 1974, transaction revealed a one half and two and one half percent weight variation; that with respect to the August 16 transaction, "no weight variation in excess of 1 percent was found . . ."; and that in connection with the August 23, 1974, transaction, the variations were .026 percent and .009 percent.

43. The weight differences involved herein cannot properly be attributed to the "break of the beam" or to a "standard allowance for packers".

44. Respondents' scale was found by government investigators to be in a back-balanced condition on August 23, 1974, immediately after Complainant's hogs had been weighed by Mr. Batten.

45. The Respondents knowingly weighed livestock at less than their true and correct weights and to facilitate such shortweighing did not issue scale tickets to the sellers of such livestock.

46. The Respondents maintained false and inaccurate records as part of their accounts and records.

47. The transactions of the weighing of the hogs on each date complained of (August 15, 16 and 23, 1974) were with Respondent Livestock Marketers, Inc. and no weighing by

Respondent Paulk and Batten Livestock Company, Inc. was shown or established. No wrongdoing was alleged, put in issue, or shown by the evidence with respect to Respondent Paulk and Batten Livestock Company, Inc. However, the business transactions between the two corporations, the stock ownership, officers, and employee relationship, negate a corporate separateness with respect to the imposition of a sanction.

Conclusion

The Respondents' contentions which include the arguments that no one remained with the hogs during crucial hours; that each weighing on the mobile scales followed a pattern that later developed not to have the mobile scales isolated from the affect of the front springs of the weighing truck; the alleged effect of the two and one half pound beam break; the alleged standard allowance for packers for shrink; and, the loss of weight normally caused by attrition, have been carefully considered. However, upon review of the entire record evidence, it is readily apparent that Complainant has borne its burden of proof and that its proposed findings of fact are supported by the record evidence, which proposed findings have been adopted in substantial part. The Respondents' explanations with regard to the violations are either nonexistent or not based upon persuasive evidence.

The misweighing of livestock and the making of payment to the consignor on the basis of false weights; the failure of a livestock dealer to print scale tickets; the operation of a scale while the scale is in a back-balanced condition; and, the creation and maintenance of false and inaccurate sales tickets constitute violations of sections 307, 312, and 401 of the Act, and of regulations, sections 201.49, 201.55, 201.46, 201.71, and 201.73-1.

For Departmental policy, see *In re: George K. Reaves*, 30 A.D. 1455 (1971), *In re: Kenneth W. Miller, et al.*, 33 A.D. 88 (1974), and the authorities cited therein.

Under Departmental policy, the test for "wilfulness" under the Act is not evil purpose or criminal intent but rather whether the prohibited act was done intentionally or with careless disregard of statutory requirements. *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182 (1972); *In re: Rayville Livestock Auction, Inc.*, 30 A.D. 886, 896 (1971); *In re: Benedict K. Goodman*, 18 A.D. 1121, 1128, aff'd, 286 F.2d 896 (7th Cir. 1961). Cf. *Economou v. U.S.D.A.*, 494 F.2d 519.

Short-weighting of hogs and the false weighing of hogs results in competitive disadvantages and are unfair and deceptive practices as to honest dealers, and to producers, and consumers.

The Respondents would agree and stipulate to a cease and desist order but resist a sanction suspension. The Complainant recommends a thirty (30) day suspension in this case. On brief, the Complainant has set forth, in detail, the reasons therefor.

The specific weighing allegations are in connection with transactions with Livestock Marketers, Inc. Both Respondents, however, are registered dealers, dealing in the millions of dollars annually. As pointed out by Complainant, both respondents are owned by the same four individuals in the same percentage of ownership. Both use the same facilities, the same equipment, and some of the same employees. The record shows that one Respondent can buy hogs on a dealer basis, turn the vast majority of such purchases to the other Respondent at no mark-up whatsoever, with the second Respondent selling the hogs and taking the profit. A suspension sanction as to only the Respondent Livestock Marketers Inc. would be highly susceptible to circumvention by the second Respondent, Paulk and Batten Livestock Company, Inc. There is a commonness of manage-

ment, direction and control of the activities of both corporations. This is not disputed.

At the oral hearing, with respect to the introduction of evidence, the Respondents' counsel took adamant exception to the receipt of alleged "sanction" evidence as it would be applicable to Respondent Paulk and Batten Livestock Company, Inc. for the reasons that no wrongdoing was alleged nor shown with respect to said Respondent and that absent some wrongdoing no sanction could apply to it.

In this proceeding, Complainant acknowledges (Tr. 529) that paragraphs 1 through 11 of the Complaint do not allege violations of the Act, and, proceeded to present its case in chief upon the pleadings as reflected in the Complaint and Answer.

Paragraph 11 of the Complaint sets forth:

"Respondents Livestock Marketers and Paulk and Batten, while separately registered with the Secretary of Agriculture and maintaining a facade of separateness, are in fact conducting their businesses at the Livestock Marketers' facility in such a manner as to render their separateness a fiction."

Respondents' Answer thereto was:

"Paragraph XI is denied and for further response thereto these Respondents show that each of the Corporate entities is a separate and distinct entity and that while ownership of the stock of each of the Corporate entities and the management thereof might be under the direction and control of and have similar officers and agents, that there is no fiction in the ownership, management or operation thereof."

With respect to the receipt of evidence relative to purchases and sales between the two corporate entities, counsel for Respondents objected on the basis that such transactions, absent a

violation, should not be admitted because undue inferences would be raised therefrom and, counsel for Respondents further stated, "But if there is anything wrong, Your Honor, with those transactions, then let them charge it as a violation in the Complaint *which they haven't done.*" (Emphasis added) (Tr. 541)

The further point is made by Respondent's counsel that, "The mere allegation of dealings together do not show a violation. The mere existence of the similarity or a fiction is not charged in this Complaint as being a violation of the Act, no particular." (Tr. 546) Counsel for Respondent contained his objection as to relevance (Tr. 552). At transcript 553, counsel for Complainant indicated, as a matter of directive or scope, his intentions of proof. At transcript 555, counsel for Respondent, in substance, renewed his point that the allegations of the Complaint were deficient with respect to receiving proof of wrongdoing against Respondent Paulk and Batten Livestock Company, Inc., and that, "If someone has done nothing, they cannot sanction them." (Tr. 556). At transcript 568 Respondents' counsel again complained of lack of notice as to sanction evidence against Respondent Paulk and Batten Livestock Company, Inc. The position of Complainant became more explicit when (Tr. 565) Complainant indicated that what it sought to show was whether or not ". . . there is a fiction of corporate entity *as to a dealer operation.*" (Emphasis added)

A continuing objection was granted Respondent's counsel (Tr. 579, 580).

Complainant's exhibit nos. 26, 27 and 30 were not admitted into evidence, but were identified, made an offer of proof, and thus are a matter of record. Exhibit no. 27 for identification purports to be a tabulation and objection, among other things, was made to its being a compilation and not the original records. Exhibit no. 26 for identification is another compilation but has supporting data. Both said exhibits for identification were first

made available to Respondents' counsel at the oral hearing who argued that such procedure, together with failure of specific allegations in the Complaint, did not afford him the opportunity to refute the same. Exhibit no. 30 for identification is less than the best evidence in light of Respondents' Exhibit A.

The basic question raised herein as to Respondent Paulk and Batten Livestock Company, Inc. is whether or not, when no violation of law is alleged and where no violation of law is proved, a suspension sanction can apply to it where there is a possibility or likelihood that said Respondent could be used to circumvent a suspension sanction applicable to Respondent Livestock Marketers, Inc. The resolution of this question is not free from doubt. However, the reasoning set forth in *Bruhn's Freezer Meats of Chicago, Inc., et al. v. United States*, 438 F.2d 1332 (8th Cir. 1971) and the authorities cited therein are sufficiently persuasive, to decide this question against Respondent Paulk and Batten Livestock Company, Inc. To do otherwise would permit a circumstance whereby a corporate entity could be utilized to circumvent proscribed conduct. It is concluded, therefore, that a suspension must apply to both corporate Respondents.

This conclusion is not arrived at lightly, and the merit of Respondents' position is recognized. In the event of Federal Court review of the decision of the Department, Respondents will be in a position to argue their contentions which are premised upon lack of due process and arbitrary capricious action on the part of Complainant which is contrary to Complainant's right, power, and authority under the Act. The evidence herein fails to show any abuse or wrong doing on the part of Respondent Paulk and Batten. However, the absence of controlling legal authority to support Respondents' position, and for the reasons set forth above, it is concluded that a suspension function, to be meaningful, must apply to both Respondents.

On brief, Complainant has set forth previous Departmental decisions which would sustain its sought for thirty day suspen-

sion. Complainant has also noted on brief that the Judicial Officer, in determining sanctions to be imposed under the Act, has stated that great weight should be given to the recommendation of the officials charged with the responsibility for administering the regulatory program. These arguments of Complainant have been carefully considered. However, there has also been taken into consideration, based upon the record evidence: Respondents do not have other "interests"; they do a substantial hog business at the present time; Respondents' facilities are essential to the orderly marketing of hogs in their locale; a suspension sanction against Respondents can be anticipated to be detrimental to the economy in the area and to have an effect upon the existing competition as well as upon Respondents and their customers.

After due consideration to the entire record evidence, and the circumstances of this case, a thirty day suspension sanction is deemed excessive. A seven (7) day suspension sanction, and a cease and desist order against both Respondents is deemed appropriate and sufficient to serve Complainant's purpose and thus would not be inconsistent with Departmental policy.

All motions, requests, and objections of the parties have been considered and to the extent they are inconsistent with this decision, are hereby denied.

Wherefore, the following Order should be, and hereby is issued.

ORDER

Respondent Livestock Marketers, Inc., its successors and assigns, its officers, director, agents and employees, directly or through any corporate or other device, in connection with transactions subject to the Act; and Respondent Paulk and Batten

Livestock Co., Inc., its successors and assigns, its officers, directors, agents and employees, directly or through any corporate or other device, in connection with transactions subject to the Act; shall cease and desist from:

- (1) Weighing livestock at other than the true and correct weights,
- (2) Issuing accountings to sellers of livestock on the basis of false and incorrect weights;
- (3) Paying the sellers of livestock on the basis of false and incorrect weights;
- (4) Failing to issue scale tickets; and
- (5) Failing to operate livestock scales owned or controlled by them in accordance with the regulations under the Act constituting Instructions for Weighing Livestock.

Respondents shall keep accounts, records, and memoranda that fully and correctly disclose all transactions involved in their businesses under the Act, including, among others, scale tickets and accounts of purchase which show the true and correct weight of the livestock purchased by respondents on a weight basis.

Respondents are suspended as registrants under the Act for a period of seven (7) days.

This Order shall be effective from the sixth day after the Decision and Order become final.

Copies hereof shall be served upon the parties.

Pursuant to the amended Rules of Practice governing proceedings under the Packers and Stockyards Act, this Decision and Order become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Secretary by

a party hereto within thirty (30) days after service, as provided for in the Rules of Practice, as amended.

Done at Washington, D.C., this 24th day of June, 1976.

/s/ DOROTHEA A. BAKER
Administrative Law Judge

United States Department of Agriculture
Before the Secretary of Agriculture

In re: }
Livestock Marketers, Inc., and Paulk } P&S Docket
and Batten Livestock Company, } No. 5141.
Inc., }
Respondents. }

DECISION AND ORDER

(Dated October 12, 1976)

In this proceeding under the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), Administrative Law Judge Dorothea A. Baker filed an initial Decision and Order on June 24, 1976, in which she suspended respondents as registrants for seven days and ordered them to cease and desist from various practices involving shortweighing of livestock.

The complainant and respondents appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to the Administrative Procedure Act has been delegated (37 F.R. 28475; 38 F.R. 10795).¹ Complainant contends that respondents should have been suspended for 30 days. Respondents contend primarily that the 7-day sanction is excessive, and that no sanction can apply to Paulk and Batten Livestock Company, Inc., which was not involved in the weighing practices involved herein. Respondents also contend that the evidence does not support the findings of shortweighing.

¹ The office of Judicial Officer is a career position established pursuant to the Act of April 4, 1940 (7 U.S.C. 450c-450g), and Reorganization Plan No. 2 of 1953 (5 U.S.C. 1970 ed., Appendix, p. 550).

Findings of Fact

1. Respondent Livestock Marketers, Inc., is a corporation with its principal place of business located at Douglas, Georgia. Livestock Marketers is, and at all times material to the complaint, was (a) engaged in the business of buying and selling livestock in commerce for its own account, and selling livestock in commerce on a commission basis; and (b) registered with the Secretary of Agriculture as a market agency to buy and sell livestock on a commission basis at Livestock Marketers, Inc., Douglas, Georgia, a posted stockyard subject to the provisions of the Act, and as a dealer to buy and sell livestock in commerce.

2. Respondent Paulk and Batten Livestock Company, Inc., is a corporation doing business at the Livestock Marketers, Inc., facility located at Douglas, Georgia. Respondent Paulk and Batten, at all times material herein, was (a) engaged in the business of buying and selling livestock in commerce for its own account; and (b) registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. The officers of respondent Paulk and Batten and of respondent Livestock Marketers are as follows:

Paulk and Batten Livestock Company, Inc.	Livestock Marketers, Inc.
Herbert Batten—President	Secretary-Treasurer
Thurston Paulk—Vice President	Vice President
Johnny Batten—Secretary-Treasurer	Director
Marvin Giddens—Director	President

Each of the above-named parties owned 25% of the stock of each corporation at all times material herein.

4. The individuals listed below are, in addition to their capacities as set forth in Finding 3, *supra*, employees of both corporations as follows:

Paulk and Batten Livestock Company, Inc.	Livestock Marketers, Inc.
Thurston Paulk—Manager	Manager
Herbert Patten—Assistant Manager	Assistant Manager
Johnny Batten—	Weigher and Office Clerk

5. During the period from July 1, 1973, to June 30, 1974, respondent Livestock Marketers bought \$7,071,189.09 worth of livestock on a dealer basis. During the period from March 1, 1973, to February 28, 1974, respondent Paulk and Batten bought \$20,240,875.85 worth of livestock on a dealer basis. During the months noted below, respondent Livestock Marketers, on a dealer basis, sold the following percentage of its total monthly sales of hogs to respondent Paulk and Batten: January 1974, 91%; March 1974, 86%; April 1974, 92%; August 1974, 93%; and September 1974, 90%.

6. During the period from August 2, 1974, through September 5, 1974, (which includes the period of the shortweighing involved herein), there were 29 transactions in which hogs were transferred by respondent Livestock Marketers to respondent Paulk and Batten. In 26 of these transactions the hogs were sold or otherwise transferred to Paulk and Batten at a price higher than Livestock Marketers' purchase price. The hogs in these 26 transactions were then sold by Paulk and Batten to a packer, Sunnyland Foods, Inc., at the same price at which Paulk and Batten had acquired them from Livestock Marketers. No mark up in price over Paulk and Batten's "purchase" price was made. The hogs in the remaining three transactions were transferred by Livestock Market-

ers to Paulk and Batten at the very same price as that at which Livestock Marketers had acquired them. Said hogs were then sold by Paulk and Batten to Sunnyland Foods, Inc., at a price higher than Paulk and Batten's purchase price.

7. With respect to the two corporate respondents in this proceeding, there is a very real possibility of using one corporate entity to avoid a suspension period levied on the other. The business transactions between the two corporations, the stock ownership, officers, and employee relationships, negate a corporate separateness with respect to the imposition of a sanction.

8. On August 15, 16, and 23, 1974, employees of complainant sold 21 hogs weighing a total of 4,978 pounds to respondent Livestock Marketers, which were weighed by said respondent in seven separate lots. Said respondent shortweighed each of the seven lots of hogs a total of 58 pounds, or 1.17%, as follows:

Livestock Marketers' Shortweighing of Hogs

Date	No. of hogs in lot	Actual Weight (pounds)	Respondent's Weight (pounds)	Shortweight (pounds)	(%)
8-15-74	1	354	345	9	2.54
8-15-74	6	1,299	1,290	9	.69
8-16-74	3	713	705	8	1.12
8-16-74	3	672	665	7	1.04
8-16-74	1	283	280	3	1.06
8-23-74	1	344	335	9	2.62
8-23-74	6	1,313	1,300	13	.99
Total	21	4,978	4,920	58	1.17 (av.)

9. On August 16 and 23, 1974, the shortweighed hogs referred to in Finding 8, *supra*, were weighed in at respondents' facility by Mr. Herbert Batten, referred to in Findings 3 and 4, *supra*.

10. After complainant's employees computed that they had been shortweighed by 22 pounds on August 23, 1974, they identified themselves and the purpose of their visit, and found that the scale was back-balanced 5 pounds. One of the complainant's employees then tested the scale and found that it was an acceptable scale for weighing livestock and well within acceptable tolerances. The State of Georgia had tested the same scale the previous month and had approved the accuracy of the scale.

11. On each of the three dates referred to in Finding 8, *supra*, the weigher did not prepare a scale ticket with a printed weight, but simply wrote a weight down on what was later received as a sales ticket.

12. On November 21, 1973, nine months prior to the violations referred to in Finding 8, *supra*, complainant's Area Supervisor, Griffin E. Bonham, sent a certified letter to Marvin H. Giddens, President, Livestock Marketers, stating:

On November 13, 1973, representatives of this office, with the assistance of market personnel, reweighed several head of cattle at the conclusion of your sale. The cattle had been sold by weight and the accounting made to your consignors on that basis.

Our investigation revealed that a number of these animals were not weighed accurately. These weight discrepancies were discussed with Messrs. Thurston Paulk, Vice President, and Cecil Grantham, Weighmaster. It was also noted that scale tickets were not being properly completed.

As you are aware, weighing livestock inaccurately is a violation of the Packers and Stockyards Act. That Act

makes you responsible for accurately weighing livestock consigned to your market for sale. * * *

If similar discrepancies are found in the future, it may be necessary to initiate administrative proceedings which could lead to suspension of your registration under the Packers and Stockyards Act.

13. Prior to the violations involved in this case, a copy of Scales and Weighing Memorandum No. 3, "Instructions for Weighing Livestock," had been supplied to respondent Livestock Marketers, and its weighers acknowledged reading such instructions and agreed to comply fully with said instructions. Said instructions directed the weighers of livestock to use scale tickets on which the weight of each draft is recorded by means of the scales' weight printing device, and stated (Comp. Ex. 20, pp. 2-3):

The weigher shall make certain that the printed weight record agrees with the weight value visibly indicated on the weighbeam or dial when correct load balance is obtained.

* * * * *

The primary responsibility of a weigher is to determine and record the true weight of livestock drafts without prejudice or favor to any person or agency and without regard for livestock ownership, price, condition, fill, shrink, or other considerations.

14. Respondent Livestock Marketers knowingly weighed the seven lots of hogs referred to in Finding 8, *supra*, at less than their true and correct weights, and to facilitate such shortweighing did not issue scale tickets to the sellers of such hogs.

Conclusions

Judge Baker, who saw and heard the witnesses testify, found that the "Respondents knowingly weighed livestock at less than their true and correct weights and to facilitate such shortweighing did not issue scale tickets to the sellers of such livestock" (Initial Decision, p. 21). Little need be said as to respondents' secondary arguments challenging the sufficiency of the evidence supporting Judge Baker's findings as to such shortweighing. Judge Baker set forth in great detail (Initial Decision, pp. 6-18) the meticulous procedure followed by complainant's employees to demonstrate beyond a reasonable doubt that respondent Livestock Marketers short-weighed each of the seven lots of hogs sold by complainant's employees to said respondent on August 15, 16, and 23, 1974. Judge Baker's findings are supported by hundreds of pages of testimony and detailed exhibits. Judge Baker's detailed findings are not included in this Decision solely in the interest of brevity, and because of the complete lack of merit to respondents' evidentiary challenge.

The respondents refer to natural shrinkage of hogs, but the complainant's investigatory procedure—which consists of placing its hogs the day or evening before a sale in a "dry lot" without access to feed and water, weighing them on the day of the sale, transporting them a substantial distance, reweighing them a mile or two (or several miles) away from the market under investigation, and then having them weighed by the market a few minutes after complainant's final weighing—eliminates shrinkage, as a practical matter, from consideration.

Respondents challenge the accuracy of the weights determined by the complainant, but complainant's scale, which weighs to the nearest pound, was tested by scale experts immediately prior to each use and found to be a highly accurate weighing device. Respondents particularly challenge complainant's failure to

place jacks under the front end of complainant's truck when it was used to obtain complainant's final weights, but that would have no effect whatever on the accuracy of complainant's weights (Tr. 251-253).¹

Respondents complain that "no standard of variations in weight have been established or promulgated" (Appeal, p. 2), but such a standard is neither necessary nor desirable. The regulations require each stockyard owner, market agency or dealer who weighs livestock to "install, maintain, and operate the scales used for such weight so as to insure accurate weights" (9 CFR 201.71). An honest and experienced weighmaster, using an accurate scale,² encounters no difficulty in insuring accurate weights.

Respondents contend in their original brief, p. 4, and in their appeal brief, p. 2, that the standard allowance recognized by packers and the trade is at least 2% to 2½% variance from the actual weight, citing the testimony of complainant's witness, Morgan W. Stephens, at pp. 327-328 of the transcript. However, in view of respondents' objection, Mr. Stephens was not allowed to develop this testimony, and it was withdrawn (Tr. 328-329). In any event, I am well aware of the trade custom referred to by Mr. Stephens and take official notice thereof. As stated in *In re J. A. Speight*, 33 Agr Dec 280, 318, fn. 24 (1974):

It is a common practice in the industry for a buying station and packer to have an agreement as to shrink. It is common that the packer will allow a 2 or 2½ percent shrink or weight loss during shipment from the buying station. If the shrink exceeds this amount the packer will bill the buying station back for the excess loss. If the shrink is

² A small tolerance in the accuracy of the scale is specified (Comp. Ex. 14, p. 2), viz., 2 pounds per 1,000 pounds (0.2%), or 2½ pounds per 1,000 pounds on a 5-pound graduated scale (0.25%). Respondents' scale was tested by the State of Georgia just before the violations and again on August 23, 1974, by complainant. Both tests showed it to be an accurate weighing device.

consistently over the allowed percentage, a packer would probably look for another buying station from which to buy his hogs. A dealer who short-weighs hogs when he buys them and then sells them on his purchase weight is eliminating his shrink to the packer. The packer gets a high yield hog on a slaughter and the buying station gets a satisfied customer and sure market for his hogs.

That trade custom is based on the expected shrinkage of well-fed livestock frequently transported a significant distance from a buying station to a packing plant. It has no relevancy to the facts of this case where complainant's investigatory technique eliminates shrinkage, as a practical matter, from consideration. Specifically, it would neither be necessary nor desirable to publish a table of shrinkage expected during the few minutes and two to four miles travel between complainant's last weighing and respondent's weighing since no shrinkage, or virtually no shrinkage, would be expected.

Although the Act does not require proof of a deliberate violation, a number of considerations compel the inference that respondent Livestock Marketers knowingly weighed the hogs involved herein at less than their true and correct weights. Just nine months earlier, Respondent Livestock Marketers was warned by complainant about inaccurate weighing of livestock and failure to properly complete scale tickets. Nonetheless, each of the seven lots of hogs sold by complainant to said respondent on August 15, 16, and 23, 1974, was short-weighed. No printed scale tickets were issued, which would facilitate false weighing. Also, on August 23, respondents' scale was found to be in a back-balanced condition. As stated in *In re Trenton Livestock, Inc.*, 33 Agr Dec 499, 513 (1974) affirmed *sub nom. Trenton Livestock, Inc. v. Butz*, 510 F.2d 966 (C.A. 4), a "back-balanced scale will short-weigh livestock by the amount of the back-balancing when the scale is used in a normal manner, but additional short-weighing can easily be accomplished."

In addition, the two persons who performed the shortweighing on the three dates were not called as witnesses by respondents (even though on two of the dates the shortweighing was by Herbert Batten, President of respondent Paulk and Batten, Secretary-Treasurer of respondent Livestock Marketers, and Assistant Manager of both firms). In accordance with the settled policy of the Department, it is inferred that their testimony would have been adverse to respondents.³

Considering all of the facts, the inference is inescapable that respondent Livestock Marketers knowingly and intentionally weighed the hogs involved herein at less than their true and correct weights.

Although Judge Baker found that only Livestock Marketers participated in the false weighing involved in this case, she made the suspension order applicable both to Livestock Marketers and Paulk and Batten. Both firms operate at the same location and use the same facilities. The same four individuals own 25% of the stock of each corporation and are officers or directors of each corporation. Judge Baker found that "[t]here is a very real possibility of using one corporate entity to avoid a suspension period levied on the other" (Initial Decision, p. 6), and that "the business transactions between the two corporations, the stock ownership, officers, and employee relationships, negate a corporate separateness with respect to the imposition of a sanction" (Initial Decision, p. 22). In these circumstances, it is settled that the corporate veils may be pierced in order to prevent the evasion of a suspension order under this Federal regulatory program.

³ See *In re Edward Whaley*, 35 Agr Dec — (decided September 22, 1976); *In re Ludwig Casca*, 34 Agr Dec 1917, 1929-1930 (1975); *In re Braxton M. Worsley*, 33 Agr Dec 1547, 1571-1572 (1974); *In re Trenton Livestock, Inc.*, 33 Agr Dec 499, 514 (1974), affirmed *sub nom. Trenton Livestock, Inc. v. Butz*, 510 F.2d 966 (C.A. 4); *In re J. A. Speight*, 33 Agr Dec 280, 300-301 (1974); *In re Sy B. Gaiber & Co.*, 31 Agr Dec 474, 499 (1972).

"Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy." *Bangor Punta Operations v. Bangor & A. R. Co.*, 417 U.S. 703, 713. "The existence of a separate corporate entity should not be permitted to frustrate the purpose of a federal regulatory statute—'corporate entity may be disregarded when failure to do so would enable the corporate device to be used to circumvent a statute.'" *Corn Products Refining Company v. Benson*, 232 F.2d 554, 565 (C.A. 2).⁴

A contrary holding would destroy effective regulation under this remedial legislation. It would not take long for most, if not all, persons subject to the Act to form two or more corporations to evade disciplinary orders. Hence it is necessary and appropriate to pierce the corporate veils and suspend both corporations owned and operated by the individuals who violated the Act through one of their corporate entities.

⁴ See, also, *Electric Bond Co. v. Comm'n*, 303 U.S. 419, 440; *United States v. Lehigh Valley R. R. Co.*, 254 U.S. 275, 258-271; *Quinn v. Butz*, 510 F.2d 743, 757-759 (C.A. D.C.); *Ruidoso Racing Association, Inc. v. C. I. R.*, 476 F.2d 502, 506 (C.A. 10); *Sebastopol Meat Company v. Secretary of Agriculture*, 440 F.2d 983 (C.A. 9); *Bruhn's Freezer Meats v. United States Department of Agriculture*, 438 F.2d 1332, 1343 (C.A. 8); *Capitol Packing Company v. United States*, 350 F.2d 67, 77 (C.A. 10); *Dickey v. National Labor Relations Board*, 217 F.2d 652, 653 (C.A. 6); *United States v. Aycock-Lindsey Corp.*, 187 F.2d 117, 118-119 (C.A. 5); *Mansfield Journal Co. v. Federal Commun. Com'n*, 180 F.2d 28, 37 (C.A. D.C.); *Atlantic Meat Co. v. Reconstruction Finance Corp.*, 155 F.2d 533, 533-535 (Emerg. C.A.), certiorari denied, 329 U.S. 737; *Ohio Tank Car Co. v. Keith Ry. Equipment Co.*, 148 F.2d 4, 6-8 (C.A. 7), certiorari denied, 326 U.S. 730; *Great Northern Co-op. Ass'n v. Bowles*, 146 F.2d 269, 271-273 (Emerg. C.A.); *Alabama Power Co. v. McNinch*, 94 F.2d 601, 618 (C.A. D.C.); *Nettles v. Rhett*, 94 F.2d 42, 46-48 (C.A. 4); *Metropolitan Holding Co. v. Snyder*, 79 F.2d 263, 266-267 (C.A. 8); *Munson S.S. Line v. Commissioner of Internal Revenue*, 77 F.2d 849, 870-851 (C.A. 2); *In re M. & H. Produce Co.*, 34 Agr Dec 700, 746 (1975), appeal pending; *In re Harry C. Hardy*, 33 Agr Dec 1383, 1407 (1974); *In re Yasgur Farms, Inc.*, 33 Agr Dec 389, 414-415 (1974); *In re Louis Romoff*, 31 Agr Dec 158, 193-196 (1972).

Although no evidence other than that relied on by Judge Baker is necessary in this respect, significant additional evidence is available. Specifically, complainant alleged in the complaint:

IX

During the period August 2, 1974 through September 5, 1974, respondent Livestock Marketers purchased hogs as a market agency and as a dealer. During said period, all or approximately all of the hogs purchased by Livestock Marketers on a dealer basis were sold or otherwise transferred to respondent Paulk and Batten. Said hogs were then sold or otherwise transferred to Sunnyland Foods, Inc. (a packer).

X

During the period referred to in paragraph IX, there were 29 transactions in which hogs were transferred to respondent Paulk and Batten by respondent Livestock Marketers. In 26 of these transactions the hogs were sold or otherwise transferred to respondent Paulk and Batten at a price higher than respondent Livestock Marketers' purchase price. The hogs in these 26 transactions were then sold by respondent Paulk and Batten to Sunnyland Foods, Inc., at the same price at which respondent Paulk and Batten had acquired them. No mark up in price over Paulk and Batten's "purchase" price was made. The hogs in the remaining transactions were transferred to respondent Paulk and Batten by respondent Livestock Marketers at the very same price as that at which respondent Livestock Marketers had acquired them. Said hogs were then sold to Sunnyland Foods, Inc., at a price higher than respondent Paulk and Batten's purchase price.

Complainant's proposed exhibits 26 and 27, which were offered to prove the allegations of paragraph X of the com-

plaint just quoted, were rejected (Tr. 591) in view of the vigorous objections by the respondents (see Tr. 548-587). However, the facts contained in exhibits 26 and 27 prove the foregoing allegations in paragraph X of the complaint, showing that in every transaction between the two respondent corporations during the month of the violations herein, involving \$521,305.96 worth of hogs (computed from Comp. Ex. 27), the owners of the two respondent corporations treated them as a single "profit center," with one corporation or the other, but never both, selling the hogs at a mark-up from its purchase price. This is strong evidence that the owners treated the two corporations as one, at least with respect to a major portion of their activities.

The respondents in their answer did not deny paragraphs IX or X of the complaint quoted above. They contended, merely, that there is no showing that such transactions were in violation of the Act or any rule or regulation contained thereunder. Complainant's attorney made an offer of proof of the rejected exhibits, citing the rules of practice (9 CFR 202.11(8)), which provide:

If the evidence [excluded] consists of a brief oral statement or of an exhibit, it shall be inserted into the transcript in toto. In such event, it shall be considered a part of the transcript if the Secretary decides that the judge's ruling in excluding the evidence was erroneous.

Under that rule, the excluded exhibits accompanied the transcript and may now be relied on, if additional proof is necessary to pierce the corporate veils.⁵

⁵ Fairness to the respondents does not require a remand for the purpose of considering this evidence inasmuch as (1) the allegations of the complaint substantiated by this evidence were not denied by respondents in their answer; (2) respondents' unwarranted objections resulted in the erroneous exclusion of the evidence; and (3) complainant's counsel cited the rule which alerted respondents to the

The complainant recommended in its brief a 30-day suspension order, but Judge Baker reduced the suspension period to seven days because of her view as to the adverse effect of a longer suspension on the respondents, the economy of the area, existing competition and respondents' customers (Initial Decision, pp. 29-30). However, Judge Baker's action in this respect is contrary to the Department's settled sanction policy.

It is the Department's policy in all of the regulatory programs administered by the Department to impose severe sanctions for serious violations to serve as an effective deterrent not only to the individual respondents but also to other potential violators.⁶ Specifically, the serious nature of the false weighing problem in the livestock industry has been set forth at great length in a number of recent decisions, and the minimum suspension period imposed by the Judicial Officer in recent years in false weighing cases has been 30 days.⁷ During the 25-year period from 1950

fact that should the ruling be regarded as erroneous the evidence would be admitted by the Judicial Officer. As stated in *Southern Nat. Mfg. Co., Inc. v. Environmental Pro. Agcy.*, 470 F.2d 194, 200 (C.A. 8), "[t]hese provisions for agency review gave adequate advance warning to petitioners that excluded unfavorable evidence might later be admitted to their detriment.

⁶ See, e.g., *In re Maine Potato Growers*, 34 Agr Dec 773, 796 (1975), affirmed *sub nom. Maine Potato Growers v. Butz*, — F.2d — (C.A. 1; No. 75-1445, decided July 30, 1976); *In re J. Acevedo & Sons*, 34 Agr Dec 120, 145-160 (1975), affirmed *sub nom. J. Acevedo & Sons v. United States*, 524 F.2d 977 (C.A. 5); *In re Southwest Produce*, 34 Agr Dec 160, 171 (1975), affirmed *sub nom. Southwest Produce, Inc. v. Butz*, 524 F.2d 977 (C.A. 5); *In re Marvin Tragash Co.*, 33 Agr Dec 1884, 1913 (1974), affirmed *sub nom. Marvin Tragash Co. v. United States Dept. of Agr.*, 524 F.2d 1255 (C.A. 5); *In re James J. Miller*, 33 Agr Dec 53, 64-80 (1974), affirmed *sub nom. Miller v. Butz*, 498 F.2d 1088, 1089 (C.A. 5); *In re Trenton Livestock, Inc.*, 33 Agr Dec 499, 539-550 (1974), affirmed *sub nom. Trenton Livestock, Inc. v. Butz*, 510 F.2d 966 (C.A. 4).

⁷ *In re J. A. Speight* (30 days), 33 Agr Dec 280, 314-330 (1974); *In re Trenton Livestock, Inc.* (30 days), 33 Agr Dec 499, 515, 523-550 (1974), affirmed *sub nom. Trenton Livestock, Inc. v. Butz*, 510 F.2d 966 (C.A. 4); *In re Braxton M. Worsley* (60 days), 33 Agr Dec 1547, 1556-1593 (1974); *In re Overland Stockyards* (49 days), 34 Agr Dec 1808, 1822-1857 (1975).

to 1974, the average suspension order imposed in false weighing cases was 245 days, and the median suspension imposed was 90 days.⁸

Even where a significant suspension period would have an adverse effect on the economy of the area and a violator's customers, it is the Department's policy to impose a severe sanction for false weighing. As stated in *In re Overland Stockyards*, 34 Agr Dec 1808, 1851-1852 (1975):

A strong argument was made in this case * * * that a lengthy suspension of the respondent stockyards would be a serious blow to the dairy industry, in particular, and to the economy of Hanford and surrounding communities. There are only two livestock markets in California, other than the respondent stockyards, specializing in dairy cattle, and they are each approximately 250 miles away. I appreciate fully the arguments made as to the adverse effect that a lengthy suspension of the respondent stockyards will have on the dairy industry and the economy in the area. However, this is an argument which is made, to a lesser degree frequently in false weighing cases. If it were given persuasive weight, the sanctions imposed under the Act for false weighing would not serve as an effective deterrent to future violations by the respondents or by other potential violators. The serious problem of livestock false weighing in the country would be even greater than it now is.

Moreover, in the present case, the facts do not establish that a 30-day suspension will seriously affect the economy of the area or respondents' customers. There is another packer buying station for hogs in the same town as respondents' facility, and a third packer hog buying station nine miles away (Tr. 605-606). Moreover, official notice is taken of the fact that there are 11

⁸ See *In re Trenton Livestock, Inc.*, *supra*, 33 Agr Dec at 525, 529-538.

registered market agencies selling hogs on a commission basis within about 40 miles of respondent's facility. One or more of such markets are selling hogs on any day of the business week.

Respondents contend that the shortweighing in this case was just slightly over 1% of the actual weight of the hogs (actually 1.17%). But 1.17% of the total value of the hogs bought by respondent Livestock Marketers would be over \$82,000 per year. Moreover, as stated in *In re J. A. Speight*, 33 Agr Dec 280, 317 (1974), in which respondents were suspended for 30 days for shortweighing hogs "just a fraction over one percent" (33 Agr Dec at 317, fn. 24):

[E]ven slight false weighing is a serious violation of the Act. The cumulative effect of 10 to 20 percent of the livestock in the country being shortweighed even by a small amount is an unwarranted burden to the livestock industry which should be significantly reduced. False weighing, at times, is used as an unfair competitive practice, rather than (or in addition to) being a means of underpaying the seller.

* * * * *

A buyer who shortweighs livestock is able to offer a few cents more per pound since he is paying it on a weight that is less than the actual weight of the livestock. The buyer who short-weighs livestock therefore has an unfair means of perpetuating himself in business at the expense of his competitors who weigh livestock accurately.

In explaining the rationale for the 30-day suspension order in the *Speight* case, it was further stated (33 Agr Dec at 317-319):

The 30-day suspension imposed in this case is substantially more severe than the suspensions imposed recently for comparable violations. The violations in this case were small compared to many other cases. The respondents

were shortweighing hogs just a fraction over one percent. The violations occurred only at their buying station, but the suspension affects their business away from their buying station. About 93% of the respondents' business is conducted away from their buying station. Hence the suspension in this case affects their entire livestock activities for about 26 business days.

* * * * *

This case should serve as notice to the livestock industry that the current sanction policy for false weighing and other serious violations of the Act is significantly more severe than the policy previously followed. If the violations in this case had been more flagrant, or if the respondents were not engaged in a daily business, with most of their business not involved in the violations, the suspension period would have been substantially greater.

In the *Overland Stockyards* case, referred to above, in which the "proven shortweighing of the 14 cows averaged 9 or 10 pounds per cow * * * [or] about $\frac{3}{4}$ of 1% of the total weight of each cow" (34 Agr Dec at 1849), complainant's recommended 90-day suspension order was reduced by the Judicial Officer to 49 days because of the tremendous size and volume of livestock handled by the respondent stockyards, viz., the respondent stockyards' investment was "8 times as great as the average of the other [stockyards] and 36 times as great as the smallest;" and respondent handled "about twice as many animals as the average stockyards" (34 Agr Dec at 1850).⁹

⁹ In two recent cases involving false weighing at hog buying stations, a 30-day suspension order was imposed in once case (*In re Trenton Livestock, Inc.*, *supra*, 33 Agr Dec 499, 516 (1974) and a 60-day suspension order in the other (*In re Braxton M. Worsley*, 33 Agr Dec 1547, 1583 (1974) in large part because Trenton's livestock business was so many times larger than Worsley's livestock business that the 30-day suspension in *Trenton* was more severe than the 60-day suspension in *Worsley* (see 33 Agr Dec at 1579-1581).

In the present case, under the Department's settled sanction policy, the suspension period would be substantially greater than 30 days except for the fact that the order applies to both corporations, which handle a very large volume of livestock, and the order also affects the auction market activity of respondent Livestock Marketers, even though the false weighing was done by Livestock Marketers only in its dealer capacity.

Considering all of the circumstances in this case, respondents should be suspended for 30 days to serve as an effective deterrent to respondents and to other potential violators, and respondents should be ordered to cease and desist from the weighing violations found to have occurred. The suspension order should also contain provisions to insure that the suspension period is effectively served. See *In re George Townsend*, 34 Agr Dec 363, 365 (1975).

Respondents contended during the oral argument before the Judicial Officer that consideration should be given to assessing a civil penalty under the Packers and Stockyards Act amendments enacted September 13, 1976 (90 Stat. 1249), rather than a suspension order; but section 10 of the amendatory legislation expressly provides that pending cases are to be disposed of under the provisions "in effect immediately prior to the effective date of this Act" (90 Stat. 1252). But even if the amendatory legislation were applicable, a 30-day suspension order would be appropriate in this case.

ORDER

Respondent Livestock Marketers, Inc., its successors and assigns, its officers, directors, agents and employees, directly or through any corporate or other device, in connection with transactions subject to the Act; and respondent Paulk and Batten Livestock Co., Inc., its successors and assigns, its officers, di-

rectors, agents and employees, directly or through any corporate or other device, in connection with transactions subject to the Act; shall cease and desist from:

- (1) Weighing livestock at other than the true and correct weights;
- (2) Issuing accountings to sellers of livestock on the basis of false and incorrect weights;
- (3) Paying the sellers of livestock on the basis of false and incorrect weights;
- (4) Failing to issue scale tickets; and
- (5) Failing to operate livestock scales owned or controlled by them in accordance with the regulations under the Act constituting Instructions for Weighing Livestock.

Respondents shall keep accounts, records, and memoranda that fully and correctly disclose all transactions involved in their businesses under the Act, including, among others, scale tickets and accounts of purchase which show the true and correct weight of the livestock purchased by respondents on a weight basis.

Respondents are suspended as registrants under the Act for thirty (30) days.

The cease and desist provisions of this Order shall become effective upon the day after service of this Order. The suspension provisions of this Order shall become effective on the 15th day after service thereof on the respondents: Provided, however, that if by any means or device whatever, all or part of the suspension period is not effectively served during the period indicated above, the effective date of the beginning of the suspension period (or the part thereof not effectively served) shall be (i) the date fixed by a court of competent jurisdiction which issues an appropriate order with respect thereto, or (ii) upon a showing made by com-

plainant that it is not likely that such an order will be entered by any court, the date subsequently fixed by the Judicial Officer (jurisdiction is hereby retained by the Judicial Officer indefinitely for this limited purpose).

Done at Washington, D.C. October 12, 1976.

/s/ DONALD A. CAMPBELL
Judicial Officer
Office of the Secretary

No. 77-1019

Supreme Court, U. S.

FILED

MAR 21 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

LIVESTOCK MARKETERS, INC. and PAULK AND BATTEN
LIVESTOCK COMPANY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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IN OPPOSITION

1. Petitioners are two corporate livestock dealers registered with the Secretary of Agriculture pursuant to the Packers and Stockyards Act of 1921, 42 Stat. 159, as amended, 7 U.S.C. 181 *et seq.* (Pet. Supp. App. 5). Both corporations operate in the same facility in Douglas, Georgia (*ibid.*). The officers of the two corporations are the same, and each officer owns 25 percent of the stock of each corporation (*id.* at 5-6).

An administrative law judge found that petitioner Livestock Marketers "knowingly weighed livestock at less than their true and correct weights and to facilitate such shortweighing did not issue scale tickets to the sellers of such livestock" (Pet. Supp. App. 18). The administrative law judge also determined that "[t]here is a very real

possibility of using one corporate entity to avoid a suspension period levied on the other" (*id.* at 6), and she therefore ordered both petitioners to cease and desist from their unfair and deceptive practices and suspended them for seven days (*id.* at 24-25).

The judicial officer of the Department of Agriculture also found that petitioners knowingly shortweighed livestock (Pet. Supp. App. 27-39). In order to maintain consistency of decisions, and to enhance the deterrent force of the law, he increased the sanction to 30 days' suspension (*id.* at 40-44).

The court of appeals affirmed (558 F. 2d 748; Pet. App. A-9 to A-13). The court held that the Secretary's finding of intentional shortweighing of livestock was supported by substantial evidence and the sanction is not "unwarranted in law or without justification in fact," *Butz v. Glover Livestock Comm'n Co., Inc.*, 411 U.S. 182, 185-86 * * * (Pet. App. A-12). It also concluded that because petitioners "functioned to a great extent as a single entity prior to the finding of the violation" and because a warning concerning weighing discrepancies "put both corporations on notice * * * prior to the violation," both petitioners properly could be suspended (*id.* at A-13).

2. Petitioners contend (Pet. 8-10) that Paulk and Batten Livestock Company may not be suspended because it did not commit the violations in question. But corporate forms may be disregarded when failure to do so would permit use of the corporate device to circumvent the purpose of a federal regulatory statute. See, e.g., *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R.*, 417 U.S. 703, 713; *Sebastopol Meat Company v. Secretary of Agriculture*, 440 F. 2d 983 (C.A. 9); *Bruhn's Freezer Meats of Chicago, Inc. v. United States*

Department of Agriculture, 438 F. 2d 1332, 1342-1343 (C.A. 8); *Mansfield Journal Co. v. Federal Communications Commission*, 180 F. 2d 28, 37 (C.A.D.C.) (license applications by two companies owned and operated by one family properly treated as application by single entity).

The evidence in this case supports the Secretary's conclusion (Pet. Supp. App. 37) that it was necessary to pierce the corporate veil. The corporations are owned by the same four persons (in the same proportions), operate at the same location, and use the same facilities. The corporations do not deal with each other at arm's length but function as a single entity, taking a single profit on individual transactions (*id.* at 29-30). The person who short-weighted the hogs on behalf of Livestock Marketers is also the President of Paulk and Batten (*id.* at 6, 18). Unless Paulk and Batten were suspended, the four owners could go on operating as before, escaping any effective sanction for their misdeeds. As the judicial officer noted: "[a] contrary holding would destroy effective regulation under this remedial legislation. It would not take long for most, if not all, persons subject to the Act to form two or more corporations to evade disciplinary orders" (*id.* at 37).

3. Petitioners' further argument (Pet. 10-12)—that the finding that there was intentional shortweighing is not supported by substantial evidence—is wrong. The scale used by petitioner was back-balanced by five pounds, and an expert testified that the back-balancing must have been intentional (Tr. 453). Petitioners issued no scale tickets, "which would facilitate shortweighing" (Pet. Supp. App. 35). Furthermore, petitioners had been warned nine months before the present incident about both inaccurate weighing and the failure properly to complete scale tickets, and petitioners were told that if similar discrepancies were found in the future, suspension of registration

could result (*id.* at 31-32, 35). As the judicial officer concluded, "the inference is inescapable that [petitioners] * * * knowingly and intentionally weighed the hogs * * * at less than their true and correct weights" (*id.* at 36).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1978.